

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.09.2020

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBARAYON

T.C.A.No.292 of 2018

M/s.Polaris Consulting and Services Limited
Virtusa Polaris Foundation,
No.34, IT Express Way,
Chennai 603 103.

.. Appellant

Versus

Principal Commissioner of Income Tax-5,
121, Nungambakkam High Road,
Nungambakkam, Chennai 600 034.

.. Respondent

Prayer:- Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, 'A' Bench, Chennai dated 29.06.2017 in I.T.A.No.2315/MDS/2016. Against the order of the Income Tax Appellate Tribunal 'A' Bench, Chennai in ITA No.2257/MDS/2016 & ITA No.2315/MDS/2016 dated 29.06.2017 for the assessment year 2010-11. Against the order of the Commissioner of Income Tax Appeals-3 Chennai dated 31.03.2016 in ITA No.61/2014-15/CIT(A)-3 for the assessment year 2010-11. Against the order of the Income Tax Department Company Circle V(2) Chennai dated 28.03.2014 PAN No.AAACP4341E for the assessment year 2010-11.

For Appellant : Mr.N.V.Balaji

For Respondent: Ms.R.Hemalatha
Senior Standing Counsel

JUDGMENT

[Order of the Court was made by T.S.SIVAGNANAM, J.]

This appeal, filed by the assessee, under Section 260A of the Income Tax Act, 1961 ('the Act' for brevity) is directed against the order dated 29.06.2017 passed by the Income Tax Appellate Tribunal Bench 'A' Chennai ('the Tribunal' for

brevity) in I.T.A.No.2315/MDS/2016 for the Assessment Year 2010-11. The appeal is entertained on the following Substantial Questions of Law:

1. Whether under facts and circumstances of the case the Income Tax Appellate Tribunal was right in upholding the order of the lower authorities whereby disallowance was made under Section 14A read with Rule 8D of the Income Tax Rules?

2. Whether under facts and circumstances of the case the Income Tax Appellate Tribunal was right in not adjudicating on the ground that the CIT (A) did not adjudicate the ground that the appellant was eligible for deduction under Section 10A of the Act, which was assessed on account of the disallowance made under Section 14A of the Act?

3. Is the conclusion of the Tribunal that the expenditure incurred in foreign currency by the Appellate needs to be excluded from the 'Export Turnover' for the purpose of computation of deduction under Section 10A of the Act not perverse and arbitrary, particularly without considering the fact that such expenditure were not part of the 'Export Turnover'?

4. Whether under the facts and circumstances of the case the Tribunal was right in holding that the expenditure incurred by the appellate in foreign currency which was not included in the 'Export Turnover' is to be excluded from the 'Export Turnover'?

2. We have elaborately heard Mr.N.V.Balaji, learned counsel for the appellant / assessee assisted by Ms.N.V.Lakshmi, learned counsel and Ms.R.Hemalatha, learned Senior Standing Counsel for the Revenue.

3. The assessee is a Company engaged in the business of software development and for the assessment year under consideration (AY 2010-11), the assessee filed its Return of Income computing a total income at Rs.52,87,83,933/- under normal computation and Rs.137,13,42,888/- under Book Profit Method. The assessee earned Dividend income of Rs.14,76,75,464/- from investment in shares. The assessee claimed that he did not incur any expenditure for earning the said income. The Assessing Officer while completing the assessment under Section 143(3) read with Section 92CA(4) by order dated 28.03.2014, disallowed a sum of Rs.1,71,68,777/- under Section 14A of the Act read with Rule 8D of the Income Tax Rules (Rules). The Assessing Officer

in doing so rejected the assessee's contention that no expenditure was incurred for earning the exempt income.

4. The Assessing Officer also recomputed the deduction under Section 10A to Rs.76,83,44,038/- by refusing certain items from the 'Export Turnover'. The Assessing Officer did not give deduction under Section 10A of the Act for disallowance made by him under Section 14A of the Act. Aggrieved by such order, the assessee preferred Appeal before the Commissioner of Income Tax (Appeals)-3, Chennai [CIT(A)]. It upheld the order of the Assessing Officer in respect of the disallowance under Section 14A of the Act and did not allow deduction under Section 10A of the Act for the disallowance made under Section 14A of the Act. With regard to the exclusion of foreign currency expenditure from the 'Export Turnover' in computing the deduction under Section 10A of the Act, the CIT(A) held that the foreign currency expenditure should be excluded from the 'Export Turnover' and the same also be excluded from the 'Total Turnover'. Aggrieved by the same, the assessee filed an appeal before the Tribunal. The Tribunal upheld the order of the Assessing Officer and the CIT(A), with regard to the disallowance under Section 14A read with Rule 8D of the Act. The Tribunal with regard to the exclusion of the expenditure incurred under the foreign currency while computing deduction under Section 10A of the Act, held that both the 'Export Turnover' and the 'Total Turnover' shall be of the same factor. Therefore when expenditure incurred in foreign currency is not included in the 'Total Turnover' and the same cannot also be included in the 'Export Turnover'. Accordingly the Appeal stood rejected. Challenging the same, the assessee is before us by way of this Appeal.

5. With regard to the first Substantial Question of Law, the Assessing Officer, CIT(A) and the Tribunal, concurrently held against the assessee. The assessee's contention was that no expenditure was incurred by them for earning the exempt income. The assessee were not able to substantiate that fact before the authorities or before the Tribunal. Both CIT(A) and the Tribunal reappreciating the factual matrix and found that the investment during the year increased from Opening Balance of Rs.3,21,68,40,000/- to Closing Balance of Rs.5,17,93,70,000/-. Further the Assessing Officer also found that the value of the assets also increased substantially to Rs.1,84,18,32,000/- from Rs.1,76,96,30,000/- and therefore applied Rule 8D and made additions under Section 14A of the Act and we find no error in the order of the Assessing Officer as confirmed by the CIT(A) and the Tribunal. Accordingly the Substantial Question of Law No.1 is answered against the assessee.

6. Substantial Questions of Law Nos.2 and 3 can be taken

together. According to the assessee, the Tribunal did not adjudicate the ground raised by the assessee that the expenditure amounting to Rs.31,11,63,096/- incurred in foreign currency from the 'Export Turnover',. While computing deduction under Section 10A of the Act, the Tribunal held that the foreign currency expenditure should not have been included in the 'Export Turnover' in first place. According to the assessee, the point raised by them was never adjudicated by the Tribunal. With regard to the expenditure incurred in foreign currency is concerned, the Tribunal came to the conclusion that the expenditure incurred in foreign currency towards communication expenses, Project Travel, Software development charges, overseas project expenses were excluded from the 'Export Turnover' and the same shall also be excluded from the 'Total Turnover'. So far as this issue is concerned, this Court has considered the identical question in the assessee's own case in T.C.A.No.961 & 962 of 2018 dated 23.10.2018 for the Assessment Year 2001-02.

7. It is the argument of learned Senior Standing Counsel that in the instant case what was disallowed was expenditure relating to telecommunication, freight and insurance and in the assessee's case for the assessment years 2001-02 and 2002-03, it was expenses for technical services. Therefore, it is the submission that if at all contended that the issue has not been considered, then the matter has to be remanded to the Tribunal for fresh consideration. In this regard, the learned counsel referred to Clause 4 Explanation 2 to Section 2(10) of the Act.

8. We have perused the judgment in the case of M/s.Polaris Consulting and Services Ltd., Vs. the Deputy Commissioner of Income Tax, (T.C.A.No.961 and 962 of 2008 dated 23.01.2018). The First Substantial Question of Law framed in those appeals was Whether the Tribunal was right in upholding the exclusion of expenditure incurred in foreign currency in export of software from the purview of 'Export Turnover' for the purpose of computing deduction under Section 10A of the Act? Therefore, the question framed for consideration was with regard to the exclusion of expenditure incurred in foreign exchange. The question was answered in favour of the assessee and against the Revenue on the following terms:

9. We have perused the order passed by the Tribunal and the finding on this issue is in paragraph No.8. The Tribunal referred to clause (iv) to Explanation (2) to Section 10A of the Act, which defines 'Export Turnover' and referred to Explanation (2) to Section 10A of the Act, which defines the term 'computer software' and held that 'technical services' include development of software, testing of software, domestication of software and since the assessee is engaged in developing and

providing software to meet the need base of their customers, the software development cannot be done without technical services and technical services is part and parcel of software development. The Tribunal proceeded to add that software is 'goods' and involve technical services and is part and parcel of rendering services; no software development is possible without technical services; software development and technical services are two faces of one coin and there cannot be software without rendering technical services and hence held that the finding of the Assessing Officer is justified as well as that of the CITA.

10. To be noted that the assessee, while contesting the appeal before the CITA as well as before the Tribunal, placed the entire materials as regards the development of the computer software. The assessee contended that they are engaged in the development of computer software programme, which is distinct from rendering of pure technical services, which would comprise of advice/consulting in relation to computer programmes. They are registered with STPI and as per the Registration Certificate, the assessee's activity is developing computer software and they are not considered as an exclusive technical service provider, as understood in the software industry parlance. The assessee proceeded to explain its activities, as per the agreement with its clients, for developing software, which consisted of eight steps, they are as follows:

"1. Scope-Ascertaining the requirement of the customer and undertaking an indepth study on the proposal.

2. Requirements definition - Specification of the basic concepts and operation design, in relation to the final deliverable.

3. Designing-Designing of the deliverable, from a macro (overall flow of the integrated software) and micro perspective (designing of each module of the programme).

4. Application development - Developing the application (i.e. The modules and the related computer programmes and codes) as per the requirements of the customer.

5. Testing - Developer Integration Testing, System Integration testing and User Acceptance Testing; to ensure that the software developed works as required.

6. Defect fixing - Rectifying errors that have arisen during the testing process.

7. Production parallel run - Undertaking a dry run of the developed software system.

8. Customer user acceptance - Final acceptance of the Software developed."

11. The assessee's contention was that activity No.7 (supra) is usually undertaken onsite at the client's location. Activity Nos.4 to 6 and 8 can happen offshore and/or onsite. The need to send the personnel of the assessee to clients' location arises based on the nature of project, its size and complexity and the requirements of the client. Further they reiterated that all the activities are integral part of software development process and what is finally delivered to the client is computer software, which is essentially a computer programme and the deliverable does not comprise of any advice on the computer software/programme. The assessee produced copy of the Registration Certificate given by the STPI, sample contract for development of computer programme, sample Statement of Work (SOW) in relation to the sample contract, copies of filing with the STPI and some sample invoices and related SOFTEX filings. Thus, by placing heavy reliance on these materials, the assessee contended that it can be inferred that their business does not include rendering of any technical services on 'standalone basis'. Further, any service rendered, such as installation/training etc., is purely incidental to the activity of development of the computer programme, akin to a seller of an advanced machinery installing the same and training the user. The assessee placed reliance on the decision of the Hon'ble Supreme Court in the case of TATA Consultancy Services vs. State of Andhra Pradesh [(2004) 271 ITR 401]. By placing reliance on the said decision, the assessee contended that both branded software and unbranded/customised software have been held to be 'goods' by the Hon'ble Supreme Court and the computer software would be in the nature of 'goods' and hence it will be erroneous to consider them as a provider of 'technical services'. Further, by referring to the

customer contract and related statements of work and invoices, the assessee contended that it is engaged only in the activity of developing computer software and is not a technical services provider. The assessee also contended that there is a distinction in law between development of computer programme and rendering of technical services and in this regard referred to Section 10AA of the Act, defining 'Export Turnover'.

12. From the order passed by the CITA, we are able to see that the submissions made by the assessee, in the form of paper book, was forwarded to the Assessing Officer and a report was called for and the the Assessing Officer has also submitted his report, but we do not find any reference to such report in the order of the CITA nor it is clear whether the assessee was favoured with a copy of the report of the Assessing Officer.

13. Be that as it may. We may point out that the CITA did not endeavour to examine the scope of the agreement. In fact, certain observations made by the CITA would enure in favour of the assessee. By way of illustration, in paragraph No.10(c) of the Order of the CITA, he would state that computer software cannot be defined or understood in a narrow sense of the term to mean only software in the form of product/goods as claimed. As the assessee is engaged in developing, transmitting and providing software to meet the needs and requirements of the clients, it encompasses providing all the relevant technical services necessary and attendant with the development and export of computer software. If this was the finding of the CITA, the resultant conclusion should have been that the assessee is only engaged in the development of the computer software and not rendering any technical services on 'standalone basis'. However, we find that the conclusion arrived at by the CITA stating that the assessee is rendering technical services is an incorrect conclusion not supported by any reasons. We would add by stating that the CITA was required to examine the documents produced by the assessee to find out as to whether there was any technical services rendered on 'standalone basis'. This is more so because, the CITA accepted that the 'development of software' encompasses 'providing of technical services'. Therefore, unless and until there was a material available in the hands of the CITA or the Assessing Officer to come to a conclusion that there is

technical services on 'standalone basis' rendered by the assessee, the Assessing Officer and the CITA were not justified in coming to a conclusion that the technical services were rendered by the assessee and the amounts paid need to be excluded.

14. Before the Tribunal, the assessee reiterated the submissions raised before the CITA and produced the technical documents as well as the scope of the work and the contract. However, the Tribunal, in our considered view, did not make an endeavour to examine as to whether the interpretation of CITA was just and proper and whether the relevant clauses in the agreement and the other documents were examined or not, but made a standalone statement that software development and technical services are two faces of one coin. We fail to understand as to whether the above is a statement made out of the personal knowledge of the Tribunal or whether it is a statement of law. If it is the statement of law, it should have been duly supported by reasons and we find none.

15. Admittedly, the decision of the Tribunal should revolve on the facts of a particular case. The Tribunal has not been established to give declaratory reliefs sans facts. Therefore, the primordial requirement for the authorities as well as the Tribunal is to examine the nature of contract between the parties i.e. the assessee and the foreign entity.

16. On a perusal of the nature of the contract and the various steps, which have been enumerated therein, we find that the element of 'technical services', have been rendered as integral part of the software development process. There was no material available before the Assessing Officer to split up the transaction into two or to bisect the transaction to find out an element of 'technical services'. As rightly pointed out by the assessee, this exercise has been done by the Assessing Officer based on the notes to the accounts in the financial statements, which would be impermissible. What is required to be examined is the nature of services rendered by the assessee to the foreign entity. Thus, we are fully satisfied that the 'technical services' rendered by the assessee is not on a 'standalone basis', but it is an integral part of the software development and up to step No.(8), as mentioned above, the assessee is bound to render all assistance to the foreign

entity. Therefore, the artificial split up of the transaction by the Assessing Officer, that too without any materials on his file, is wholly unsustainable.

17. For the above reasons, we are constrained to set aside the order passed by the Tribunal and answer the Substantial Question of Law No.1 in favour of the assessee.

9. The finding rendered in the above appeals in favour of the assessee would show that the same was rendered upon appreciating the factual aspect regarding the nature of contract entered into by the assessee. Therefore we are of the considered view that the decision in the assessee's own case in T.C.A.No.961 & 962 of 2018 should enure in favour of the assessee for the assessment year under consideration namely AY 2010-11 also.

10. In the case of M/s. Renault Nissan Technology & Business Centre India Private Limited vs. Commissioner of Income Tax 5 in T.C.A.No.212/2018 dated 17.07.2020, this Court has considered the Substantial Question of Law as to whether the Tribunal erred in holding that the expenditure incurred in foreign exchange by the assessee therein was to be excluded from the 'Export Turnover' for the purpose of computing deduction under Section 10AA of the Act and the question was answered in favour of the assessee in following terms:

10. Before we consider such a plea, we need to take note of the crux of the issue which was raised by the assessee before the Assessing Officer at the first instance, the reply to the show cause notice issued by the Assessing Officer, in their application before the DRP and their submissions before the Tribunal in the appeal filed by the Revenue. If the facts are culled out from all the proceedings, one should get answer to the controversy which would help us to answer the Substantial Question of Law framed for consideration.

11. In the Accountant's Report in Form No.56F for the assessment year under consideration, it has been stated that in respect of reimbursement of IT support, Travel and Technical related expenditure, there is no element of any provision of services and the actual cost incurred has been reimbursed. Further these reimbursements constitute a part of operating cost base of the assessee which has been recovered by the assessee from their associated

enterprises at their respective arms length markups. Therefore, the arms length nature of reimbursement transactions also reviewed, aggregated and analysed under TNMM analysis conducted for the segments discussed in the report. The Report states that the reimbursement of IT support and Travel & Technical related expenses appears to be consistent with the arm's length standard from an Indian transfer pricing perspective.

12. Subsequently, the assessee submitted two letters, of which, the letter dated 13.02.2013 would be relevant. Among other things, the assessee referred to explanation 1 to Section 10 AA of the Act and stated that the Company has not incurred any expenditure in foreign exchange on freight, telecommunication charges and insurance and thus, no amount is deductible from "'Export Turnover'" on this count. In the draft Assessment Order, the Assessing Officer refers to the show cause notice issued to the assessee, calling upon the assessee to explain as to why the expenditure incurred in foreign exchange be not excluded from the "'Export Turnover'", while computing deduction under Section 10 AA of the Act. In response to the said show cause notice, the assessee once again reiterated the definition of "'Export Turnover'" in Explanation 1 to Section 10 AA of the Act and submitted that a term 'expense' used in the above context would be only expenses in the nature of freight, telecommunication or insurance and not any other expenses. The assessee also relied upon certain decisions of the Hon'ble Supreme Court and other High Courts and Tribunals. The Assessing Officer did not agree with the assessee in referring to the decisions and explanation 1 to Section 10 AA of the Act, though noted that the explanation states that the expenses should be incurred in foreign exchange in rendering of service outside India, without considering whether any services was rendered by the assessee outside India, holding that the said provision is patent and clear and the expenditures incurred by the assessee in foreign exchange should be excluded from the "'Export Turnover'" for the purpose of computing deduction under Section 10 AA of the Act.

13. The assessee filed an application before the DRP, in which, on this specific issue they have stating that the assessee operates on a cost plus

model, the 'Total Turnover' comprises of total cost plus arm's length mark up. Further they have specifically stated that they have no element of any provision of services and only actual cost incurred has been reimbursed to the assessee; these reimbursements constitute a part of the operating cost base of the assessee which has been recovered from the associated enterprises and the foreign exchange expenditures are the components of the 'Total Turnover', as these are reimbursed at arm's length mark up. After referring to the decision in the case of CIT Vs. Lakshmi Machine Works [(2007) 290 ITR 667], Commissioner of Income Tax Vs. Sudarshan Chemicals Industries Limited (2000 (245) ITR 769), CIT Vs. K.Rajendranathan Nari [(2004) 265 ITR 35 (Kerala)] and the decision of the Special Bench of the Tribunal in the case of ITO Vs.. Saksoft Limited [2009 121 TTJ 865 (ITAT) Chennai], the assessee submitted that it follows the cost plus model approach and the 'Total Turnover' of the Company comprised of Cost plus arm's length mark up and that there is no reimbursement of any expenditures so as to exclude the same from the 'Export Turnover' and the 'Total Turnover'. While considering the said submission, the DRP took note of the definition of 'Export Turnover' in explanation 1 to Section 10AA and observed that it necessary that any expenses incurred in foreign exchange by the assessee should be in respect of rendering of services outside India. While framing the points for determination, the DRP observed that the question is whether the expenditures incurred by the assessee in foreign exchange was in respect to services outside India. After steering clear as to what would be 'Export Turnover' as defined under the Act, the DRP exempted the expenditures incurred by the assessee and held that the expenditures are not in respect to services rendered by the assessee outside India and therefore, it cannot be excluded from the 'Export Turnover' and the Assessing Officer was directed to delete the exclusion of foreign exchange from the 'Export Turnover' of the business and the deduction under Section 10 AA to be recomputed as follows:

PARTICULARS	AMOUNT (INR)
Travel Expenses	41,199,254
IT&Technical Support Services	115,521,782

PARTICULARS	AMOUNT (INR)
Reimbursement to Renault Global management	69,851,671
Reimbursement to Nissan Motor Company Ltd.,	29,635,976

14. The Revenue filed an appeal before the Tribunal. To be noted the main ground on which the Revenue were on appeal before the Tribunal was on the direction of the DRP to exclude the foreign exchange expenditure. Unfortunately, the Tribunal did not discuss the matter but proceeded on the basis that foreign currency expenditures cannot be considered as part of 'Export Turnover' and at the same time, it cannot form part of 'Total Turnover'. The Tribunal did not decide as to whether it was expenses incurred by the assessee in respect of services rendered by the assessee outside India. The assessee was faced with this issue at the very first instance before the Assessing Officer. The assessee has explained, nevertheless, the Assessing Officer did not take into consideration as to whether there were any services outside India and held against the assessee and proceeded to make a draft assessment. Before the DRP, which is a fact finding expert body, the assessee placed all materials and established that the assessee did not render any services outside India and they operate on a cost plus model and the reimbursement constitute a part of the operating cost which was recovered by the assessee from their associated enterprises. This factual matrix had not been examined by the Tribunal.

15. We find that no useful purpose would be served in remanding the matter to the Tribunal for fresh consideration as submitted by the Revenue as an alternate submission. The principal submission of the Revenue is to support the order passed by the Tribunal and seeking for dismissal of this appeal. Even in the grounds of appeal filed by the Revenue before the Tribunal, a cost plus model of functioning by the assessee appears to be have not been disputed but their contention was that the definition of 'Export Turnover' in explanation 1 to Section 10 AA does not distinguish or exclude reimbursement or advances. In our considered view, the issue is not as to whether reimbursement or advances, but the issue is whether these were

incurred by the assessee in foreign exchange in respect of rendering services outside India. If it is established that no services have been rendered outside India and the assessee has been reimbursed the actual cost only, the question of exclusion from the 'Export Turnover' does not arise.

16. The submission of Ms.R.Hemalatha, learned standing counsel is that the expenses should have direct nexus with the interest of the industrial undertaking. In support of such contention, reliance is placed on the decision of the Division Bench of this Court in CIT VS. Menon Impex Private Limited [2003 (128) Taxmann 11 (madras)] which was affirmed by the Hon'ble Supreme Court of India in India Comnet International Private Limited Vs. ITO [2012 (26) Taxmann.com 349 (SC)].

17. In our considered view, the decision referred to by the Revenue may not be of assistance to their case because, the dispute is not with regard to whether there is direct nexus between the amount and the activity of the industrial undertaking. The issue in the instant case is whether at all expenses were incurred for rendering any of the services outside India. On facts, it has been established that no such services have been rendered. Therefore, we are of the considered view that the Tribunal fell in error in reversing the decision of the DRP.

18. For all the above reasons, appeal filed by the assessee is allowed and the order passed by the Tribunal is set aside and the order passed by the DRP is restored and the substantial questions of law is answered in favour of the assessee. No costs.

11. The identical question was considered by the Hon'ble Division Bench in the case of The Commissioner of Income Tax-I, Chennai vs M/s.Zylog Systems Limited in T.C.A.No.312 and 315 of 2011 dated 20.02.2020 and the question was answered in favour of the assessee in the following term:

6. The relevant portion of the judgment of the Division Bench of the Karnataka High Court in "CIT -Vs- Mphasis Ltd.," reported in [2016] 74 taxmann.com 274 (Karnataka) is quoted below for ready reference.

" 2. The first substantial question of law arose for consideration before this Court in ITA No.776/2007 disposed of on 13.06.2014, wherein this Court has held at paras 18 and 19 as under:-

18. From the aforesaid provision it is clear that the consideration in respect of computer software received in or brought into India by the assessee in convertible foreign exchange is deducted from the profits of the said business. In other words the assessee is not liable to pay any income tax on such consideration received from export of computer software. However the said 'Export Turnover' does not include freight, telecommunication charges or insurance attributable to the delivery of computer software outside India or expenses if any incurred in foreign exchange in providing technical service outside India. In other words out of the said 'Export Turnover' the following amounts have to be deducted;

- a. freight
- b. telecommunication charges
- c. insurance attributable to the delivery of computer software outside India;
- d. expenses, if any, incurred in foreign exchange in providing technical services outside India;

19. If the assessee is engaged in the business of providing technical services outside India in connection with the development or production of computer software then expenses if any incurred in foreign exchange in providing technical services outside India is liable to be deducted out of 'Export Turnover'. The said provision has no application in the case of export out of India of computer software or its transmission from India to a place outside India by any means. The law makes a distinction between technical services rendered in connection with export of computer software and export of technical services for the purpose of development or production of computer software outside India. If the technical services rendered by the assessee's Engineers is in connection with the

export of computer software for the purpose of testing, installation and monitoring of software such a turnover do not fall within clause (ii) of subsection (1) of section 80HHE of the Act. Such a turnover falls within sub-clause (i) of subsection (1) of Section 80HHE of the Act, that is export out of India of computer software or its transmission from India to a place outside India by any means. The expenditure incurred in the form of foreign exchange for such services cannot be excluded in computing the 'Export Turnover' as it forms part of the 'Export Turnover'. In the instant case as is clear from the order of the Assessing Authority, he proceeds on the assumption that the assessee is a company engaged in rendering technical services outside India in connection with production of said software. Therefore the expenditure incurred in foreign exchange in providing such technical services outside India of Rs.62.7 lakhs was excluded in computing the 'Export Turnover' and 'Total Turnover' for arriving at deduction under Section 80HHE of the Act. The assessee is engaged in the business of export out of India of computer software and its transmission to places from India outside India. Before a computer software is exported, the Software Engineers of the assessee would have initial discussion with regard to the requirements, specifications etc. Thereafter computer software is manufactured and then it is transmitted from India to a place outside India. The software Engineers deputed abroad who among other things have to do testing, installation and monitoring of software supplied to the client. Though the said services are technical in nature it does not fall within clause (ii) of subsection (1) of section 80HHE of the Act of providing technical services outside India in connection with the development or

production of computer software. It falls under sub-clause (1) of sub-section (1) of Section 80 HHE of the Act. Therefore, the said expenditure cannot be excluded in computing export turn over. In that view of the matter we do not see any merit in this appeal. Accordingly, the said question of law is answered in favour of the assessee and against the revenue. Ordered accordingly.

3. In view of the said judgment, the substantial question of law is answered in favour of the assessee and against the Revenue.

4. Insofar as the second substantial question of law is concerned, the same was considered by this Court in the case of Commissioner of Income-Tax And Another Vs. Tata Elxsi Ltd., reported in (2012) 349 ITR 98 (Karn). It has been held as under "17. From the aforesaid judgments, what emerges is that, there should be uniformity in the ingredients of both the numerator and the denominator of the formula, since otherwise it would produce anomalies or absurd results. Section 10-A is a beneficial section. It is intended to provide incentives to promote exports. The incentive is to exempt profits relatable to exports. In the case of combined business of an assessee, having export business and domestic business, the legislature intended to have a formula to ascertain the profits from export business by apportioning the total profits of the business on the basis of turnovers. Apportionment of profits on the basis of turnover was accepted as a method of arriving at export profits. In the case of Section 80HHC, the export profit is to be derived from the total business income of the assessee, whereas in Section 10-A, the export profit is to be derived from the total business of the undertaking. Even in the case of business of an undertaking, it may include export business and domestic business, in other words, 'Export Turnover' and domestic turnover. The 'Export Turnover' would be a component or part of a denominator, the other component being the domestic turnover. In other words, to the extent of 'Export Turnover', there would be a

commonality between the numerator and the denominator of the formula. In view of the commonality, the understanding should also be the same. In other words, if the 'Export Turnover' in the numerator is to be arrived at after excluding certain expenses, the same should also be excluded in computing the 'Export Turnover' as a component of 'Total Turnover' in the denominator. The reason being the 'Total Turnover' includes 'Export Turnover'. The components of the 'Export Turnover' in the numerator and the denominator cannot be different. Therefore, though there is no definition of the term 'Total Turnover' in Section 10-A, there is nothing in the said Section to mandate that, what is excluded from the numerator that is 'Export Turnover' would nevertheless form part of the denominator. Though when a particular word is not defined by the legislature and an ordinary meaning is to be attributed to the same, the said ordinary meaning to be attributed to such word is to be in conformity with the context in which it is used. When the statute prescribes a formula and in the said formula, 'Export Turnover' is defined, and when the 'Total Turnover' includes 'Export Turnover', the very same meaning given to the 'Export Turnover' by the legislature is to be adopted while understanding the meaning of the 'Total Turnover', when the 'Total Turnover' includes 'Export Turnover'. If what is excluded in computing the 'Export Turnover' is included while arriving at the 'Total Turnover', when the 'Export Turnover' is a component of 'Total Turnover', such an interpretation would run counter to the legislative intent and impermissible. If that were the intention of the legislature, they would have expressly stated so. If they have not chosen to expressly define what the 'Total Turnover' means, then, when the 'Total Turnover' includes 'Export Turnover', the meaning assigned by the legislature to the 'Export Turnover' is to be respected and given effect to, while interpreting the 'Total Turnover' which is inclusive of the 'Export Turnover'. Therefore the formula for computation of the deduction under Section 10-A, would be as under:

Profits of the business Export turn over x of

the undertaking ['Export Turnover' + domestic turn over) Total turn over"

5. Accordingly, the said substantial question of law is answered in favour of the assessee and against the Revenue. "

7. The said view was affirmed by the Hon'ble Supreme Court and the relevant portion of the judgment is quoted below for ready reference.

"1.The instant petition is filed by the petitioner-Revenue assailing the judgment dated 01.08.2014 passed by the High Court of Karnataka at Bangalore in I.T.A.No.1075 of 2008.

2. When the petition is taken up for consideration, Mr.Vikramjit Banerjee, learned Additional Solicitor General appearing for the petitioner-Revenue and Mr.Parcy Pardiwala, learned Senior Counsel appearing for the respondent, are in agreement that SLP (C) No.2373/2015 preferred by the Revenue in respect of connected ITA No.196 of 2009 which was disposed of by the very same common order dated 01.08.2014 was dismissed by this Court on 28.01.2019 having taken note similar grounds raised in the special leave petition.

3. Hence taking note of the fact that in respect of common judgment this Court has already dismissed SLP (C) No.2373 of 2015 relating to the Assessment Year 2004-05 and in the present case except that issue relates to Assessment Year 2003-2004 all other aspects are on the very same point, we are not inclined to entertain the instant petition.

4. Accordingly, the special leave petition shall stand dismissed. Pending applications, if any, shall also stand disposed of."

12. In the light of the above the Substantial Question of Law No.2 and 3 are answered in favour of the assessee.

13. With regard to the Substantial Question of Law No.4 is concerned, we find that the assessee has substantially raised a ground in the appeal before the Tribunal contenting that the CIT (A) has failed to consider the ground of the assessee that the Assessing Officer has erred in not providing deduction under Section 10A with respect to the exempt income under Section 14A of the Act.

14. On a perusal of the impugned order, we find that the Tribunal has not adjudicated the said issue and confined its

finding only with regard to the correctness of the disallowance under Section 14A read with Rule 8D of the Act. In our considered view this issue needs to be considered by the Tribunal to examine as to whether the assessee is entitled for a relief on that ground, more so because, the finding rendered by the Tribunal with regard to the disallowance under Section 14A read with Rule 8D has been confirmed by us in this judgment.

15. In the result, the Appeal is Partly Allowed and the Substantial Question of Law no.1 is answered against the assessee and in favour of the Revenue. Substantial Questions of Law nos.2 and 3 are answered in favour of the assessee and against the Revenue. Substantial Question of Law no.4 is remanded to the Tribunal for fresh consideration after affording an opportunity to the assessee. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Principal Commissioner of Income Tax-5,
121, Nungambakkam High Road,
Nungambakkam, Chennai 600 034.
2. The Income Tax Appellate Tribunal 'A' Bench,
Rajaji Bhavan, Besant Nagar, Chennai
3. The Commissioner of Income Tax Appeals-3,
Nungambakkam, Chennai.
4. The Income Tax Company Circle V(2), Chennai.

+1cc to Mr.N.V.Balaji, Advocate, Sr.No.30053
+1cc to Mr.T.Ravi Kumar, Advocate, Sr.No.29964

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T.C.A.No.292 of 2018

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